

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
441 4th Street, NW, Suite 540-S
Washington, DC 20001-2714

A.R.

Petitioner,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF HUMAN SERVICES
Respondent

Case No.: HS-P-07-101463

FINAL ORDER

I. Introduction

On March 23, 2007, Petitioner filed a hearing request pursuant to D.C. Official Code § 4-210.01 and/or 1 DCMR 2805, seeking review of his eligibility for certain Rehabilitation Services Administration (“RSA”) benefits. Specifically, Petitioner sought amendment to his Individual Plan of Employment (“IPE”) to provide for housing costs and related relief. I scheduled an evidentiary hearing for June 12, 2007. The hearing commenced on that date but due to a conflict in the interpreter’s schedule, was continued and completed on June 19, 2007.

At the hearing, Joseph R. Cooney, Esq., appeared on behalf of Petitioner, who attended on both hearing dates and testified on June 19th. Gene Page, Esq., appeared on behalf of Respondent. The following witnesses testified for Respondent: Marlene Jones-Kinney, Chief of Branch 1, Client Services, RSA; Deirdre Burchette, Vocational Rehabilitation Specialist, RSA; and Jo C. Bond, Supervisor, Rehabilitation Specialist.¹

¹ Of the exhibits pre-filed by the parties, only Petitioner’s Exhibit (“PX”) 100 was admitted into evidence.

Based upon the testimony of the witnesses, my evaluation of their credibility, and the exhibit admitted into evidence, I now make the following Findings of Fact and Conclusions of Law.

II. Findings of Fact

Petitioner is an adult District resident with a disability and is an eligible client of RSA. Petitioner has received vocational services from RSA since July 24, 2006. His identified vocational goal is, Computer and Mathematical Occupations. Petitioner attends Gallaudet University (“GU”) for his vocational program. PX 100

Petitioner first moved to the District from Maryland in 2001, and although he did not initially attend classes, lived in a dormitory on the GU campus. In 2003 he married and moved with his wife, a GU employee, to on-campus, married housing where they continue to reside. They have two children, ages two and four.

Petitioner first sought services from RSA in the summer of 2005, and Ms. Burchette served as his counselor. She initially delayed processing his application pending receipt of disability verification. As a result, the parties did not execute the Petitioner’s IPE until August 21, 2006. The IPE provides for Petitioner to receive tuition assistance, books and supplies, a unit fee and health insurance fees. At or about the time that he executed the IPE, Petitioner asked Ms. Burchette if RSA provided housing assistance to its clients. Based upon her understanding of an unwritten RSA policy, Ms. Burchette advised him that RSA did not provide housing to District residents who attend school in the District. She did not consider the Petitioner’s inquiry to be a request for housing and did not process an application for such assistance.

During January 2007, the Petitioner requested housing assistance in an e-mail to Ms. Burchette. She took no action on this request. Had she follow standard RSA procedure she would have referred this inquiry to her supervisor, Ms. Bond,. Like Ms. Burchette, Ms. Bond believes that, pursuant to an unwritten policy, RSA does not normally provide housing assistance to District residents attending school in the District; however, the decision to grant or deny an application involving these circumstances is not within her discretion. Instead, her supervisor, the RSA Chief of Client Services, ultimately would decide this issue.

On January 5, 2007, the RSA and Petitioner amended his IPE. The amendment did not provide for housing assistance. On March 23, 2007, Petitioner filed his hearing request.

III. Conclusions of Law

The RSA program provides vocational rehabilitation services to eligible individuals with disabilities, and prior to July 1, 2007, the District Department of Human Services, RSA, implemented this program on behalf of the District of Columbia. *See* 34 C.F.R. § 361.57(b)(2); 29 DCMR 100; and 29 DCMR Chapter 1 *generally*. The parties agree that Petitioner has a disability and meets the criteria for the RSA program. *See* 29 U.S.C. § 722(a)(1).

Under applicable regulations, an individual may apply for RSA services by filing an

application or “otherwise requesting services from the Rehabilitation Services Administration.”²

Except in exceptional circumstances, once an individual applies for vocational rehabilitation services, “an eligibility determination shall be made within sixty (60) days.” 29 DCMR 102.1.³

If RSA determines that an individual is ineligible for services it must “[I]nform the individual in

² 29 DCMR 101.7 provides:

An individual shall be considered to have submitted an application for services when the individual or the individual's representative, as appropriate:

(a) Applies for services by:

(1) Completing and signing an application form;

(2) Completing a common intake application form in a One-Stop center requesting vocational rehabilitation services; or

(3) Otherwise requesting services from the Rehabilitation Services Administration; and

(b) Has provided to the Rehabilitation Services Administration the information necessary to initiate an assessment to determine eligibility for services; and

(c) Is available to complete the assessment process.

³

29 DCMR 102.1 provides:

Once an individual has submitted an application for vocational rehabilitation services, an eligibility determination shall be made within sixty (60) days, unless:

(a) Exceptional and unforeseen circumstances beyond the control of the Rehabilitation Services Administration preclude making an eligibility determination within sixty (60) days and the Rehabilitation Services Administration and the individual agree to a specific extension of time; or

(b) An exploration of the individual's abilities, capabilities and capacity to perform in work situations is carried out in accordance with subsection 103.13 or, if appropriate, an extended evaluation is carried out in accordance with subsection 103.14.

writing ... of the ineligibility determination” 29 DCMR 104.1(b); *See also* 29 U.S.C. § 722(c)(2) and 34 C.F.R. § 361.43(b).

In this case Petitioner argues that "vocational rehabilitation services" include maintenance payments for rent to enable him to attend vocational training. Petitioner relies on the federal rehabilitation act's broad definition of "vocational rehabilitation services" to support his argument that money for housing should be included in his IPE. 29 U.S.C. § 723(a) (including as rehabilitation services anything "necessary to assist an individual with a disability in preparing for, securing, retaining, or regaining ... employment"); see also 34 C.F.R. § 361.5(b)(35) (defining maintenance as "monetary support provided to an individual for expenses, such as food, shelter, and clothing . . . that are necessitated by . . . the individual's receipt of vocational rehabilitation services.")

Petitioner further contends that Respondent's failure to notify him in writing of its decision to deny his request violates 29 USC § 722(a)(5) and 34 C.F.R. 361.43. He further asserts that Respondent's reliance upon an unwritten policy in denying Petitioner housing assistance violates both federal and state law. 34 CFR 361.50; D. C. Official Code §§ 2-552 and 2-558(b).

Petitioner's contention that Respondent is required to provide *written* notice of any denial of RSA benefits is supported by applicable federal law. 29 U.S.C. § 722(c)(2) and 34 C.F.R. § 361.43(b). Moreover, an agency decision premised upon an unwritten policy would raise significant due process concerns. *Aikens v. D.C. Department of Housing and Community Development*, 515 A.2d 712 (D.C. 1986), (an agency's reliance on an unwritten policy to terminate a participant's Section 8 benefits was a violation of due process); *see also Carey v.*

Quern, 588 F.2d 230, 232 (7th Cir. 1978); *see also Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1134 (8th Cir. 1984).

Yet, in this case RSA erred first and foremost by completely and inexplicably failing to construe Petitioner's request for housing assistance as an application. Both parties acknowledged that in January 2007, at or about the time he executed the amendment to his IPE, Petitioner also requested housing assistance via an e-mail to Ms. Burchette. Although this request constituted an application for services under 29 DCMR 101.7(a)(3), Respondent did not consider or act upon Petitioner's application. Contrary to the mandate of the District's regulation, it failed to make any decision on Respondent's request. *See* 29 DCMR 102.1 ("an eligibility determination shall be made within sixty (60) days.")

Absent a showing of prejudice, Respondent's failure to issue a determination within the requisite time period is not itself a basis for granting relief. *see Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 136-36 (D.D.C. 2002) (holding that the failure to formulate an IEP for a disabled child did not require the granting of relief, where no prejudice resulted from the delay); *see also Blackman v. District of Columbia*, 277 F. Supp. 2d 71, 81-82 (D.D.C. 2003) (distinguishing the case from *Shaw* because DCPS "engaged in [an] unnecessary and harmful delay"). A delay does not cause prejudice if an applicant is ultimately ineligible to receive requested benefits. Conversely, if an applicant is deemed eligible to receive services, he/or she may well establish that a delay was prejudicial.

Since RSA never processed the Respondent's application, Petitioner's contention that the Respondent relied upon an unwritten policy in denying services is without merit. Ms. Burchette did not consider the Petitioner's initial inquiry regarding housing services to be a request for

housing and did not process an application for such assistance. Had she treated this inquiry or Petitioner's later e-mail as a request to amend Petitioner's IEP, she would have referred this request to her supervisor, Ms. Bond, who in turn would have referred it to her supervisor, the Chief of Client Services, for a decision. Both Ms. Bond and Ms. Burchette believe that an unwritten RSA policy precludes housing assistance to District residents attending school in the District; however, it does not automatically follow that their supervisor, the actual decision maker, would rely upon this purported policy or necessarily deny housing services if afforded the opportunity to render a decision.

As to Petitioner's principal request, that his IPE be amended to provide for housing assistance, it is clear that RSA may provide such services that "are in excess of the normal expenses of the individual and that are necessitated by . . . the individual's receipt of vocational rehabilitation services." 34 C.F.R. § 361.5(b)(35); *see also* 29 USCS § 723, (vocational rehabilitation services are any services "necessary to assist an individual with a disability in preparing for, securing, retaining, or regaining employment"). When Petitioner requested housing assistance from Respondent, the agency had an obligation to assess and determine whether such services were in excess of his normal expenses and necessary for him to pursue his vocational goal. The Respondent failed to provide this assessment and determination.

Accordingly, Respondent's failure to act in response to Petitioner's request for housing assistance is reversed; however, the issue of whether Petitioner is eligible to receive housing assistance must be remanded to RSA for its assessment and determination. *Morrison v. D.C. Dep't of Employment Servs.*, 834 A.2d 890, 898 (D.C. 2003) ("Where an agency fails to address an issue presented to it, we generally remand the case . . . for a determination."). Since 34 C.F.R.

§ 361.5(b)(35) requires an examination of whether Petitioner's requested "maintenance" services are in excess of normal expenses and necessary, it is incumbent upon Respondent to make an individualized determination as to what Petitioner's normal expenses are and whether he needs housing assistance to continue his vocational program, and if so, the extent to which such benefits shall be extended.

IV. Order

Therefore, it is hereby, this _____ day of _____, 2007:

ORDERED, that Respondent's failure to act in response to Petitioner's request for housing assistance is **REVERSED** and this matter is **REMANDED** to Respondent for an assessment and determination of whether the Petitioner is eligible to receive housing assistance; and it is further

ORDERED, that Respondent's assessment shall be completed and it shall issue a determination within 30 days from the date of this Order; and it is further

ORDERED, if Respondent determines that Petitioner is eligible to receive RSA services for housing assistance, Respondent shall meet with Petitioner to amend the IPE to include these services. If Respondent determines that Petitioner is not eligible for such services under the RSA program, Respondent shall provide appropriate written notice of its decision, with reasons for the decision, and Petitioner may file a hearing request to appeal the decision if he should so desire.

7/19/07

/s/

Louis J. Burnett
Administrative Law Judge